UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	Case No. 1:15-CR-00157 (RJA)(HKS)
Plaintiff,	)	
vs.	)	June 2nd, 2016
COREY KRUG	)	
Defendant.	)	

TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE RICHARD J. ARCARA
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: WILLIAM J. HOCHUL, JR.
UNITED STATES ATTORNEY
BY: JOHN FABIAN, ESQ.
ASSISTANT UNITED STATES ATTORNEY
138 Delaware Avenue
Buffalo, NY 14202

For the Defendant: CONNORS & VILARDO, LLP
BY: TERRENCE M. CONNORS, ESQ.
1000 Liberty Building
424 Main Street
Buffalo, NY 14202

Court Reporter: MEGAN E. PELKA
Robert H. Jackson Courthouse
2 Niagara Square
Buffalo, NY 14202

THE CLERK: Criminal action 2015-157A. United States vs. Corey Krug. Oral argument on defendant's objections to report and recommendation of Magistrate Judge Schroeder. Counsel, please state your name and the party you represent for the record.

MR. CONNORS: Good morning, Your Honor. Terrance M. Connors appearing for Corey Krug.

MR. FABIAN: John Fabian on behalf of the government.

THE COURT: All right. Mr. Connors?

MR. CONNORS: May it please the Court, I start today's argument with a proposition that the primary guarantee against the bringing of stale and untimely criminal charges is the Statute of Limitations. I concede that for purposes of this argument.

But as the cases tell us, specifically in 1971, the *Marion* case and six years later in the *Lovasco* case, the Supreme Court stated in both of those cases that the Statute of Limitations may be the primary guarantee, but it's not the only guarantee. Due process plays a role in determining whether or not an individual should be subjected to an oppressive delay, compromising the ability to defend and causing prejudice.

THE COURT: Okay. Mr. Connors, the -- first of all, I think there's two basic considerations here and that is one, are your clients prejudiced and number two, was the delay

intentional by the government to gain a tactical advantage over defendants. Now, I think the government has pretty much conceded the first point.

MR. FABIAN: Your Honor, there is certainly some prejudice in all parties in a case where there's a significant delay.

THE COURT: I think that's -- from what I can see here, witnesses are missing, evidence has been missing. There's a lot of factors here that would clearly seem to satisfy the first requirement and I don't think you can disagree with that.

MR. FABIAN: There are certainly some bases for the finding of prejudice.

THE COURT: The point on this issue is, was the government delay, was it intentional to gain a tactical advantage? I think that's the critical issue here, Mr. Connors, because I don't think that -- the first part, I think you certainly have met that.

MR. CONNORS: I think you're right, Your Honor and you've identified an issue that was the subject of quite a bit of discussion before the magistrate. As it turns out, I think I can shed some light on that issue.

Back as early as 2002, the City of Buffalo was one of nine cities that engaged in lengthy discourse with the Department of Justice. The reason for that discourse was that

the Department of Justice had instituted a review of practices and procedures in nine cities and one state. Buffalo was one of them.

It started out that they would look at the use of pepper spray, but it expanded into an examination of use of force; policies, procedures, complaint forms, reporting abilities. And essentially what happened is that the Department of Justice worked out an arrangement through a reviewer who is appointed, an independent reviewer, where they would report to the Department of Justice on a regular basis. It started quarterly and maybe went a little but longer than that during the course of the lengthy agreement.

So, what happened is that the Department of Justice had access to all of the complaints of use of force. Now, you know, in this particular situation, the complaints go back all the way to 2010; four years, 364 days before the statute was to expire.

So, really, our position is this: It's one of those unique situations where the Department of Justice had access to all the complaints. That's undisputed. We give them the agreements. No one has really ever contested the fact that they had this information. And what happened is, there's an unexplained delay, unjustified delay as the cases call it, because essentially what the Department of Justice did is they cataloged all of these use of force complaints, looked at

them, reviewed them and declined to move further with civil or criminal actions. So, as a result of that and that cataloging, they -- you know, it's interesting. I'm not trying to impose upon the government a duty to prosecute at any particularly time, but what I am trying to impose and what I think the cases support me on, is that you can delay the prosecution of those cases, but you do it at your own peril.

If you wait four years and 364 days because you think it's going to gain a tactical advantage for you because if you cumulate these use of force complaints, it makes stronger evidence. Everyone will concede that three cases are stronger than two cases, are stronger than one case. So, what they did is they declined to take any action that was --

THE COURT: You're assuming they knew about these two incidents though, right?

MR. CONNORS: Well, I am inferring knowledge on the part of the Department of Justice because of the exchanges that took place pursuant to a documented agreement. So, they could have pursued them. The district attorney could have pursued them. And one of the cases that I cited in our brief talked about coordinate arms of law enforcement; that one can't bounce the obligation back from one court from one law enforcement agency to the other.

Basically, it's there and what happens is, they do nothing. There's not even an attempt to explain the delay.

When we argued this down below, there was no claim of, we were doing a lengthy investigation because investigative delay has been held to be a reason.

THE COURT: Well, my understanding is the government is claiming that they did not begin investigating your client until the Thanksgiving incident in 2014 and when they got the reports from the Buffalo Police Department, that was the first time that they became aware of those two other incidents which are in Counts 3 and 4.

MR. CONNORS: Well --

THE COURT: Or -- I'm sorry, not Count 3 and 4, Counts 1 and 2.

MR. CONNORS: One and two, yeah. They have not said that directly, but they do imply that they didn't have knowledge and their investigation started later, but what they have never responded to in any of the documents that I have submitted is the fact that the knowledge was inferred because of this agreement where they were supposed to look at documents.

We know from the exact wording and language in the agreement that they were forwarded to the Department of Justice. In some instances, extensions were requested to extend the time for investigating and responding. We know that there was a reporting system and a tracking system for all these complaints.

So, what I'm saying, Judge, is that the government cannot just put their head in the sand and say, okay. You, City of Buffalo, have to report all of these use of force complaints to us pursuant to an agreement, but we're not going to do anything about them until we see fit. And if they decide to do it four years and 364 days later, that is for a distinct tactical advantage. There's no other reason and no other explanation has been offered and it's logical.

I mean, it's logical that they would say, all right, now we have this one case that occurred on Thanksgiving which we believe is a defensible case and was a proper exercise of force under the circumstances, so let's attach two other cases that we never prosecuted, we never decided to prosecute, was just left in abeyance because now we're going to get an advantage. We're going to load up, as the cases say, the distinct risk of having the jury think that Corey Krug is a thug, that he's a rogue cop, because they take these old cases. That's clearly a tactical advantage.

THE COURT: What would you say if the Court severed those two? What would be your position on it?

MR. CONNORS: You make a good point, Judge. At my oral argument in front of Magistrate Schroeder, he said to me, well, Terry, that's what the motion for severance is for. I would say this, though: Severance doesn't address the due process argument. Severance doesn't address the fact that

these cases were just left in abeyance for four years and seven months, four years and 364 days. And so, to revive them now and to bring a prosecution for them is very, very unfair and it's a fundamental fairness question because that's what due process is; especially when, as we've identified, we've lost witnesses, we've lost documents, we've lost our ability to recreate certain manuals and procedure. We've identified six areas of prejudice.

So, I don't believe they should be allowed to take these cases and they shouldn't be allowed to reinstate them.

THE COURT: All right. What is your position, Mr. Fabian?

MR. FABIAN: Your Honor, first of all, as the defendant conceded, the primary protection against delay is from the Statute of Limitations. The Statute of Limitations serves a purpose. Second of all, as --

THE COURT: You made it by two days on the one count.

MR. FABIAN: We did. That's correct, Your Honor, but we did. There is a time set forth in the Statute of Limitations. Second of all, to establish a due process violation, which the defendant is attempting to do here, first of all, he bears the heavy burden to establish the violation. So, he has a heavy burden to establish the two prongs that Your Honor identified. The one we're focused on now, of course, is whether there was an intentional or deliberate

delay. He bears the heavy burden to prove there was an intentional or deliberate delay. He's not done so. He's asking Your Honor to make an inference without proof. The government has offered the explanation as Your Honor noted that the criminal investigation began after the Thanksgiving incident. That's when the United States became aware of the incident from a criminal perspective and began -- then they've --

THE COURT: What about all this review that was going on since 2002?

MR. FABIAN: That was done by the civil division. As Judge Schroeder noted in his report and recommendation, that was done by the civil division and a separate group. There's no imputed knowledge. There was no knowledge -- Your Honor, to find there was an intentional or deliberate delay, you would have to say that the government knew about those events in 2010 and/or 2011 and then --

THE COURT: Mr. Connors says that either they knew about it or should have known about it.

MR. FABIAN: That's what he says. They did not know and he bears the heavy burden to show there was an intentional delay and you would have to find that we -- you would have to infer that proof that we knew that and that at that time we said, well, let's wait and see if something else happens later down the road. So, we're going to intentionally delay and

maybe down the road something else will happen and we'll indict that. There was no intentional delay. I mean, you have to evaluate it from that point in time from when the delay began. You have to say there was a deliberate decision for a tactical advantage not to proceed then and to proceed later. There's no evidence for that. There's no basis for an inference of that.

THE COURT: All right. Let's go to the next issue, the motion to dismiss based upon the Grand Jury taint. I think that's the next issue to address.

MR. CONNORS: Yes, Your Honor. The federal Grand Jury was empanelled in this case on May 8th, 2015. It was empanelled to consider evidence regarding the incident involving Marcus Worthy of August 29th, 2010; the arrest of Daniel Rashada on February 4th, 2011 and the November 27th, 2014 incident that occurred six months prior to the empaneling of the Grand Jury.

So, while this Grand Jury is sitting and listening to the testimony, while they're trying to decide the case in an unbiased, impartial manner as they are obliged to do under their oath, the government decides to file a criminal complaint. And they file a criminal complaint not on the stale, untimely cases, they file the complaint on the one that just happened six months earlier. There is no basis for the filing of that complaint. The Grand Jury is pending. It's

not a situation where we run into occasionally, Your Honor, where a criminal complaint is filed and the matter is submitted to the Grand Jury. This Grand Jury is deliberating right now to decide whether or not there is reasonable cause to believe that a crime has been committed.

So, we get a complaint, a lengthy complaint, mass media press conferences, press releases that are talking about this while this jury is deliberating. It doesn't make sense. Why would they do something like that; other than to convey to the Grand Jurors, regardless of what you think about the probable cause, we think there is probable cause and here's a lengthy affidavit that we've now filed publically and conducted a press conference that says, we believe Corey Krug is guilty of these crimes.

THE COURT: How would you distinguish that, what happened here, with the case *United States vs. Silver*?

MR. CONNORS: I was actually involved in that case a little bit and I was down there for some of the proceedings. Here's how I would distinguish it. Remember in *Silver*, Your Honor, a situation that we frequently see where a criminal complaint was filed initially, then the Grand Jury was empaneled and they were asked to deliberate about it. It's not what we have here. We have the reverse of that. We have a Grand Jury empaneled, evidence being presented and then they file the complaint while the Grand Jury is pending. The date

of the complaint it was filed was August 12th. The Grand Jury had been deliberating since May 8th, Your Honor. There's no reason why you should file that criminal complaint. It just defies credulity that they would do something like that while the Grand Jury is pending. There's no time limit involved. They're not even close to the Statute of Limitations.

THE COURT: I think -- and you can address this -- normally, if you file an indictment and it's bare bones, it just states the statute, gives you a time and gives you, basically, very little information except it's RICO cases or conspiracy cases where they're very elaborate, you file a complaint. They can be affidavits that are 2 pages, 10 pages, 100 pages going to extraordinary detail as to what the case is all about.

And sometimes, I said that I realize that the complaint had been filed and it's, you know, maybe it's -- let's just -- like, I guess, maybe it's 50 pages, okay? It goes into great detail about the case. The next day, an indictment comes which charges the bare bones violation of various statutes. Why do you do that?

MR. FABIAN: Your Honor, it's within the United States' discretion to initiate the case with a complaint in terms of the --

THE COURT: What's the purpose of -- what do you -- other than to tell the world what the case is all about.

MR. FABIAN: Well, the public, you know, has a right to know the charges against the individual and then when, on a case-by-case basis --

THE COURT: I suppose you could do that in every single case; file a complaint and then indict the same day?

MR. FABIAN: Absolutely you could, Your Honor.

THE COURT: Because you go into more detail, but what is the advantage to the government to advise the public of what the case is all about?

MR. FABIAN: That's one legitimate basis. Another is that sometimes filing a complaint will start the process. It can begin the process of --

THE COURT: Well, this case here, you've got the Grand Jury investigating it.

MR. FABIAN: Correct.

THE COURT: And while they're investigating, you have a complaint filed.

MR. FABIAN: Which can start plea negotiations. It can be a marker in that --

THE COURT: What's the time difference between the Grand Jury starting the investigation and the time the complaint was filed?

MR. FABIAN: In this case?

THE COURT: Yeah.

MR. FABIAN: I believe the Grand Jury was empaneled

May 8th and the complaint was filed August 12th, so three months and four days. The indictment was the first indictment.

THE COURT: This was to aid in plea bargaining, is that what you said?

MR. FABIAN: I'm not -- I'm not -- I did not make the decision to file the complaint in this case, but that is certainly one of the bases for filing a complaint. But let me step back, Your Honor. I mean, as to the issue before the Court here, the question is, did the -- again, on this issue, the defendant has a burden to show the government's use of the Grand Jury was proper.

Grand Jury proceedings are accorded a presumption of regularity. There can be error only if there's a showing of actual prejudice to the Grand Jury that the Grand Jury's decision was substan3tially influenced by some improper conduct. There's no such showing here. There's no showing the Grand Jury --

THE COURT: The strongest case you have to support yourself is *U.S. vs. Silver*, I assume?

MR. FABIAN: *Silver* is certainly --

THE COURT: Mr. Connors comes up with a -- why that's different, why the factors are different there. How do you address that?

MR. FABIAN: Well, Your Honor, *Silver* was a -- I

believe there was a complaint with a 35-page affidavit. Unlike in *Silver*, I mean, the U.S. Attorney in that case, I believe, appeared on MSNBC the day or two after filing a complaint. He was -- had some speaking engagement at a forum where he addressed at length that *Silver* case. There were some statements, although qualified, that there were --

THE COURT: The Court wasn't too happy about that.

MR. FABIAN: The Court was not too happy. But ultimately, they found that even if those -- even if that conduct was improper or possibly the basis for an ethical or other inquiry, it was not a basis for dismissing the indictment because there was no showing that the Grand Jury's decision to indict --

THE COURT: Did that issue go to the Second Circuit?

MR. FABIAN: It did. It quoted a case called *Noonan*. It also quoted a case called *Myers;* both of which addressed pretrial publicity. And so, it was relying on -- *Silver* was relying on Second Circuit precedent in reaching its conclusions to the matter.

Simply put, even in cases where there is substantial pretrial publicity and overwhelming pretrial publicity, the Grand Jurors are -- in one of the cases, *Noonan* says Grand Jurors are allowed to read newspapers articles and decide to act on that; unlike a petit jury or a petite jury which is supposed to be not influenced by any outside sources, the

Grand Jury may.

THE COURT: Mr. Connors?

MR. CONNORS: Judge Caproni did not give him a free pass on that. She took him to task in the opinion and found the claim to be a meritorious claim. But the difference, of course, is that what the U.S. Attorney in the Southern District did not do was to send out all of those messages while his Grand Jurors were debating the case; deliberating on whether or not to issue an indictment.

That's what makes this case different and that's what make it worse. And I would be willing to suggest that Judge Caproni would look very harshly at what was done in this particular case also, because in addition to the criminal complaint, there were a flurry of media reports broadcast and print and it was everywhere.

It's just an unfair tactic and frankly, there's never been a proffered reason to justify that. Seriously, Judge, plea bargaining? Plea bargaining? That would be the reason why they did that? That's no reason that's been offered to the Court.

THE COURT: All right. Why don't we take a five-minute break and we'll pick up on the motion to dismiss Count 2 of the superseding indictment. We're talking about the flashlight and whether it's an instrument and then, we'll pick up on the motion to suppress the statements and I believe the

last one will be the severance, okay? We'll take a five-minute break.

THE CLERK: All rise.

(Brief recess)

THE CLERK: All rise.

THE COURT: Okay. Mr. Connors, the motion to dismiss Count 2 of the superseding indictment.

MR. CONNORS: Yes. I acknowledge, Your Honor, that I am on the low side of this argument. I've read the *Gray* case that was provided to me by Jack Rogowski and I don't wish to withdraw the argument, but I understand that his position is that the federal government is, in fact, an agency that can review conduct by the Buffalo Police Department.

When I first looked at the claim and I looked at the statute, I saw that it required a federal nexus and *Gray* talks about the federal nexus and suggests that it's enough to allege that there is contact between the Buffalo Police Department and the U.S. Attorney's office as prosecuting authority for these types of cases.

I still believe, though, that it's a deficient count. I believe it's facially deficient and I believe also that the allegation with respect to the "impact weapon" is deficient, but I'm not --

THE COURT: That's when the flashlight is a weapon?

MR. CONNORS: Yes.

THE COURT: What do you think about that? Is that a fact question for a jury?

MR. FABIAN: Absolutely, Your Honor.

THE COURT: How do I charge the jury? What do I say to the jury?

MR. FABIAN: Your Honor will charge the -- the jury will obviously -- the jury will have read the indictment, read that an impact weapon has been charged and Your Honor will give an instruction -- some instruction along the lines of that's a matter of fact for the jury to decide whether the evidence presented to the Court in the trial on the basis --

THE COURT: I'll have to explain to them what a weapon is. What is it? How am I -- what am I going to say to the jury in defining -- they need a guide.

MR. FABIAN: Right. Well --

THE COURT: What do I tell them?

MR. FABIAN: Your Honor can define weapon and what's a weapon as set forth in our motion. Webster's defines what a weapon is --

THE COURT: What does Webster's say? You quoted it.

MR. FABIAN: We did, Your Honor. A weapon is -- Webster's defines a weapon as something used to injure, defeat or destroy. And a large flashlight is --

THE COURT: Is that the definition I'll give the jury? What are the -- what does the statute say or what does

the legislative history say? What do they -- give me some guidance as to what a weapon is.

MR. FABIAN: Your Honor, I have not evaluated legislative history as to the definition of impact weapon or whether that would be --

THE COURT: The pattern jury instructions, what do they say?

MR. FABIAN: I have not gotten to the point of defining what jury instructions are, but I do believe that it's an issue of fact --

THE COURT: You understand that the Court, if I agree with your position, that I'll have to give very helpful, you might say, instructions to the jury, so they'll be able to decide the fact question of whether or not a flashlight is a weapon. You can't just throw -- you decide what a weapon is. That's not good enough. We have to go into a little more detail. I assume you'll be prepared to do that if I go along with your argument in this case?

MR. FABIAN: Absolutely, Your Honor. The government will consult with the defense if necessary or provide its own suggestive instructions --

THE COURT: Well, the defense is not going to help you out on that. The defense is going to tell you clearly it's not a weapon.

MR. FABIAN: But we usually consult with one another

on the jury instructions.

THE COURT: All right. We'll go from there.

MR. CONNORS: The reason I moved to dismiss that count is just as you pointed out. I did not think there was a sufficient guide in the Grand Jury to establish that. Impact weapon is a term of art. It's a gun. It's an asp. It's a baton, those types of things.

A flashlight is something that an individual officer buys by himself or herself and I just didn't think that there would be sufficient evidence before the Grand Jury to establish that it was an impact weapon and therefore, the count should be defective. I didn't think they had a guide to tell them what, in effect, is a weapon.

THE COURT: What was the length of this flashlight?

MR. FABIAN: I believe it was 12 inches.

MR. CONNORS: Twelve inches.

THE COURT: This big (indicating)?

MR. FABIAN: Correct, Your Honor.

THE COURT: Is that about 12 inches?

MR. FABIAN: I can't see it from here, but that looks approximately accurate, Your Honor.

THE COURT: You can't see this (indicating)?

MR. FABIAN: I mean, I'm not close enough to specifically evaluate whether that's 11 or 13 inches, but it looks close, Your Honor.

THE COURT: Now we're going to deal with the motion to suppress the statements. Mr. Connors?

MR. CONNORS: In the *Garrity* issue that was argued before Magistrate Schroeder, we made a request that the government provide us with information as to what happened to the documents from the point of subpoena until the point of tainting as they represented. Magistrate agreed with me and directed the U.S. Attorney to provide such an affidavit.

We just discussed that and they're going to provide me with that affidavit so they'll be able to make a determination as to whether there's a basis for a *Garrity* application.

THE COURT: All right. When is that going to be done?

MR. FABIAN: Your Honor, I'll get that taken care of with deliberate speed. I'll just give the information, get an affidavit put together. It should not take much time to do.

THE COURT: All right. Well, I don't want to leave that open-ended.

MR. FABIAN: If Your Honor can give me within the next two weeks?

THE COURT: Two weeks? All right. And then, I don't know, Mr. Connors may decide just to agree with you or say well, no, that needs further argument. I don't know.

MR. FABIAN: I think that sounds fair.

THE COURT: What we'll do is two weeks to file those papers and then, we'll give Mr. Connors two weeks to respond and then, I'll either consider it submitted or if I feel that further argument is necessary, I'll -- on that issue alone, I'll set a tentative argument date. I'll set it today. Let's say about a week or two later. This case is -- it's not too old. It's a 15. So, we're talking two weeks. We'll put it -- let's get dates. Two weeks. What's two weeks from today? Whatever.

THE CLERK: So, that will be -- the government's affidavit is due June 16th.

THE COURT: And two weeks after that?

THE CLERK: That's June 30th is two weeks after that.

THE COURT: Okay. We'll set argument -- if -- a tentative argument, we'll put it that way. I'll respond when the papers have been filed whether argument is necessary or not. If it is, we'll set a tentative date now. This is just tentative.

THE CLERK: Two weeks?

THE COURT: Two weeks.

THE CLERK: July 14th at 9 o'clock.

THE COURT: Okay. That's tentative, okay? Just so we can make sure everyone's calendar is clear. I don't think it will be an extensive argument if there's going to be argument at all. Okay. The next thing I think we have to

deal with is severance.

MR. CONNORS: It is, Your Honor.

THE COURT: All right. Mr. Connors?

MR. CONNORS: Your Honor, we have sought severance of the counts of the indictment pursuant to Rule 8(a) and 14(a) under the criteria that exists for both of those.

Rule 8(a) allows the government to join counts that are not part of a common transaction; counts that are essentially unrelated only under specific circumstances as articulated in that rule. And in this case, the government has chosen one reason to join it. They say that they're of the same character, not based on the same active transaction, no common scheme or plan, the same character.

Well, in looking at the research for those cases that were decided under that particular section, you see a lot of red flags; a number of warning signs as articulated by the Second Circuit and the United States Supreme Court. The case law is really interesting on this topic because they distinguish that one ground, same or similar character.

And here's what they say, United States Supreme Court. They say essentially that the customary justifications for joining same-character crimes largely disappear when that's your only basis. Efficiency and economy essentially go out the window because of the risks and the other dangers in joining those type of prongs and those type of allegations.

The disadvantage to which the defendant is put and the potential danger he's exposed to from a joinder of those offenses is easily understood, says the Supreme Court in *Halper* and -- I'm sorry, the Second Circuit in *Halper* and a District Court in the District of Columbia.

And they go on further to warn us about including what is customarily categorized as propensity evidence. What they say is, the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which his guilt is found for the other crimes charged; exactly what I said was the tactical advantage that the government sought by delaying the prosection; exactly the problem that's created.

In addition, they talk about the less tangible but perhaps equally persuasive problems that are caused by joining same or similar character charges. It's greater with respect to these charges than any other types of counts properly joined under Rule 8(a).

Halper says it's exactly that sort of a case where a jury would be likely to cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not do so, which is exactly the argument we made under the delay, but it's even stronger now because of the problem with the severance. So, we think under those circumstances and under that case law, Rule 8(a) would provide

us with a severance because the last thing you want to do, Your Honor, is have evidence that's admitted to prove disposition to commit crime. This inference is so high under those circumstances that the Courts presume there's prejudice. And unless the government can come up with some substantial reason, some basis for it -- and they have not proffered one so far. All they've said is, well, we think it's the same type of a charge.

And Judge McMahon in the Southern District said, when all that can be said on two separate offenses is that they are the same or similar character, the customary justifications for joinder, efficiency and economy, largely disappear. He said, the jury may consider that a person charged with doing so many things is a bad man must have done something and may cumulate the evidence against him and one offense can be used to convict him of another, even when the proof is taken together, it's not enough to convict of either.

They also talked -- and Judge McMahon talks about jury instructions because their response is, well, there's an instruction that the Court can give. What they say about same or similar character is, even when cautioned, juries are apt to regard with a more jaundiced eye a person charged with two crimes than a person charged with one.

THE COURT: Mr. Fabian, what do you say to all that?

MR. FABIAN: Your Honor, that's why Courts routinely

give limiting instructions in that -- limiting instructions in that situation.

THE COURT: Is there a difference between joinder and severance?

MR. FABIAN: There is, Your Honor.

THE COURT: What is the difference?

MR. FABIAN: Rule 8(a) is the rule addressing joinder and essentially, it's -- the rule is liberally construed in favor of joinder. There are a variety of bases for joinder where, you know, acts are part of the same act or transaction or they're part of a common scheme or plan or like here when the conduct is similar in nature, doesn't have to be too precise in identity. The crimes can be --

THE COURT: That's the only reason why you say there should be no severance here, because they're similar in nature?

MR. FABIAN: That's the provision of Rule 8(a) that we're relying on in this case, Your Honor, yes, because counts need only have a general likeness to each other. We go far more than that. These are charged with the same crimes. Like Your Honor had the *McCabe* case a couple years ago, where the defendant was charged with a variety of types of fraud of different financial institutions, the first seven counts, I believe, were -- involved mortgage fraud. The other counts involved fraud with auto and other loans is my understanding

and those are counts that are, under Rule 8(a), permissibly joined, which is construed liberally, counts that have a likeness to one another here. It's not just a likeness, it's the same crime.

Then, you've got, as to severance under Rule 14, the defendant, again, I sound like a broken record but again, the defendant bears the burden here. They've got to establish that a joint trial would cause substantial prejudice resulting in a miscarriage of justice. That's not established here.

Courts routinely try cases with multiple defendants or one defendant with multiple crimes, you know, routinely. And what's the correction for any potential spillover effect? It's not severance, it's limiting instructions. Courts routinely give limiting instructions in this type of situation. In the *McCabe* case, Your Honor found --

THE COURT: What would be the limiting instruction I would give?

MR. FABIAN: Your Honor would instruct the jury that the multiple counts, they consider the evidence as to each count separately.

THE COURT: That's it?

MR. FABIAN: Well, you can't use the -- in fact, there's multiple counts to influence your decision on the other counts, if you evaluate each count independently, just as Your Honor instructed the jury to do in the *McCabe* case.

It's a very similar thing.

In that case, Your Honor found that the spillover alleged could be found in every case involving a joinder of counts and held a limiting instruction would be appropriate to avoid spillover. So, the exact same type of limiting instruction applied in that case would be appropriate in this case. And of course, as the Supreme Court has held --

THE COURT: What is the common evidence you intend to submit to the trial?

MR. FABIAN: Your Honor, there would certainly be common witnesses that would testify about policies and procedures and training with regard to the Buffalo Police Department and use of force and both training as to how to use use of force. There would be training about what the proper documentation and procedures in that situation are -- is. As set forth in our briefing, there may -- we have not decided yet --

THE COURT: You haven't what?

MR. FABIAN: We have not -- as set forth in our briefing, there may be an expert on use of force. We haven't decided whether to call --

THE COURT: You need an expert?

MR. FABIAN: That's what we're evaluating.

THE COURT: What would the expert say?

MR. FABIAN: The expert would testify about -- would

give expert testimony on the use of force policies, how they're drafted and --

THE COURT: Where would this expert come from?

MR. FABIAN: Where would the expert come -- I don't know yet. Your Honor, we've been consulting with the civil rights division in DC about, you know, talking about this issue. Like I said, we don't -- we haven't decided --

THE COURT: We're going to have a battle of the experts here?

MR. FABIAN: I don't think so, Your Honor, but it's a possibility. I mean, coming back, that's one potential commonality. Regardless, I mean, this is not distinct from the routine case where counts are routinely joined, tried together, judges use limited instructions, jurors are presumed to follow their instructions. There's no evidence -- there's no meeting of the burden to show substantial prejudice resulting in a miscarriage of justice.

THE COURT: All right. Mr. Connors?

MR. CONNORS: It's absolutely distinct from that commonplace situation you face in a multi-count indictment. First of all, with respect to a curative instruction, that's got to be given with consent of the defense. That's a very difficult call to make. Many times, a curative instruction just highlights the fact that there's additional charges. So, whether you even give that charge, Your Honor, would be

something would have to be discussed. Secondly, this claim about an expert witness, that's as weak as my claim saying I should get severance because he may testify. Neither of them carry any water. So, that doesn't make the day.

What does make the day and what they've never responded to in their papers or in oral argument is this: The Court of Appeals admittedly, I believe it's the Tenth Circuit, said the uncharged crime or act, because it's essentially a 404(b) analysis, must be close in time to the crime charged. Close in time. These things are four plus years apart. They're not close in time under any circumstances. They can't possibly overcome that hurdle.

And secondly, in the case law from the Second Circuit, the *Halper* case, this is why same character, same or similar-character allegations are so dangerous. We advise prosecutors and trial courts to exercise caution with regard to the joinder of same or similar-character offenses. That was the panel that had Judge Oakes, Griffon and Metzger and the reason they do that is articulated in all the cases that follow.

Of any type of a joinder of offenses, this is the greatest peril to the defendant. This is the greatest problem that exists because of the chance that a jury is going to say, listen, this is a bad person; not is he guilty of each and every element on every count. It's clearly propensity

evidence.

So, last night, when I was looking at some cases when John had sent me his brief about issues in 404(b), I went and I pulled six cases on 404(b) dealing with police officers in the context of civil litigation and these six cases all say inadmissible. Don't do it. Propensity. Dangerous.

Admittedly, they were civil cases and I have actually an extra brief on that. I know you limited us to five pages, but I do have a one-page brief that cites these cases that I found last night that say it's clear you don't allow that kind of evidence because of the danger, the harm, the inability of an individual to get a fair trial and the likelihood that no jury, no matter how well instructed, is going to be able to overcome that feeling.

THE COURT: I assume that you have no problem with the 2010, 2011 being tried together?

MR. CONNORS: I don't have a good argument for that.

THE COURT: All right, gentlemen. I'll consider the matter submitted. Thank you very much.

MR. FABIAN: Your Honor, if I may correct --

THE COURT: I'm not going to probably decide -- well, I have to think about whether I'm going to decide this before the briefing on the other one issue.

MR. CONNORS: *Garrity*.

THE COURT: If you can provide the information, I'll

have to figure it out. It's all fresh in my mind right now and I really don't -- sometimes, when you look at this stuff a month later, it's not quite as clear as it is after oral argument. Thank you, gentlemen.

MR. CONNORS: Thank you, Your Honor.

MR. FABIAN: Your Honor, if I may, Your Honor, just to correct myself on one point, a cleaning up matter. You asked if the *Silver* case had cited Second Circuit cases. I told you they cited *Noonan* and *Myers*. *Noonan* was a Second Circuit. *Myers* is actually a District Court case.

THE COURT: Okay.

MR. FABIAN: I just wanted to correct myself.

THE COURT: Okay. Thank you.

(Proceedings ended.)

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I certify that the foregoing is a correct transcription of the proceedings recorded by me in this matter.

s/ Megan E. Pelka

Court Reporter